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In The

Supreme Court of the United States

October Term, 1993

A.J. ARAVE, WARDEN,

Petitioner,

vs.

DONALD KENNETH FETTERLY,

Respondent.

Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a federal habeas corpus action, the Due Process Clause and the Eighth Amendment provide a means whereby a Court of Appeals may overcome a state procedural bar and apply a new rule requiring that a federal district court grant a petitioner a stay of execution to permit him to file a successive state postconviction action for the purpose of litigating an unexhausted claim that a state statutory interpretation must be retroactively applied to his case.

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PETITION FOR WRIT OF CERTIORARI

A. J. Arave, warden of the Idaho Maximum Security Institution, is the custodian of Respondent Donald Kenneth Fetterly, and petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which granted federal habeas relief vacating the prisoners sentence of death.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Fetterly v. Paskett*, 997 F.2d 1295 (1993). The order of the court denying appellee's petition for rehearing and rejecting a suggestion for rehearing *en banc* is reported at 15 F.3d 1472 (1994), together with the opinion of Judge Kozinski, joined by Judges Hall and Wiggins, dissenting from denial of the suggestion for rehearing *en banc*. A copy of the opinions are appended to this petition.

JURISDICTION

The opinion of the Court of Appeals was filed July 9, 1993. A petition for rehearing and suggestion for rehearing *en banc* were denied January 24, 1994. The opinion of Judge Kozinski, dissenting from denial of the suggestion for rehearing *en banc* was amended March 8, 1994.

This case arose under 28 U.S.C. § 2254. Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, 5th Amendment:

* * *

"no person shall be deprived of life, liberty or property without due process of law."

U.S. Constitution, 8th Amendment:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Constitution, 14th Amendment:

* * *

" . . . nor shall any state deprive any person of life, liberty or property without due process of law."

Idaho Code § 19-2515(c): **Inquiry into mitigating or aggravating circumstances - Sentence in capital cases - Statutory aggravating circumstances - Judicial findings.**

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

Idaho Code § 19-2719(4),(5): **Special appellate and post-conviction procedure for capital cases - Automatic stay.**

(4) Any remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.

(5) If the defendant fails to apply for relief as provided in this section and within the time limits specified, he shall be deemed to have waived such claims for relief as were known, or reasonably should have been known. The courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.

STATEMENT OF THE CASE

After a death sentence imposed on Donald Kenneth Fetterly had become final, Fetterly filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho, obtaining a stay of execution. He then obtained new counsel and sought to have federal proceedings held in abeyance while he returned to state court to attempt to litigate an unexhausted and defaulted issue. The district court denied the motion. The Court of Appeals for the Ninth Circuit reversed, holding that Fetterly's motion to stay proceedings should have been granted. The State of Idaho petitions for review because the holding of the Court of Appeals raises issues of general importance and conflicts with the decisions of this Court and the courts of other federal circuits.

Procedural and Factual Background

Fetterly and his girlfriend, Karla Windsor, were charged on September 12, 1983, with first degree murder and robbery. Fetterly and Windsor had earlier been arrested for an unrelated offense and were free on bail. They decided to burglarize the home of Sterling Grammer in order to "get a fresh start." They broke into Grammer's house on Tuesday evening, September 6, 1983. Mr. Grammer did not return to his home until morning, but Windsor and Fetterly made no attempt to take anything during the night. Instead, they waited for their victim to return. When he did, they bound his hands and feet with tape. They also placed tape over his face in a manner which prevented him from breathing. Fetterly then repeatedly stabbed Mr. Grammer with such violence that twice the knife went through his breastbone. After murdering Mr. Grammer, Fetterly and Windsor dumped his body in a river. Both were later arrested.

Fetterly was tried on charges arising out of the murder and burglary. The jury found him guilty of burglary, grand theft and first degree murder, both with premeditation and in the perpetration of or attempt to perpetrate a burglary. Fetterly's conviction and sentence were affirmed by the Supreme Court of Idaho. *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), *cert. denied, Fetterly v. Idaho*, 749 U.S. 870 (1986). Fetterly also filed a petition for state collateral relief which was denied. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), *cert. denied, Fetterly v. Idaho*, 492 U.S. 925 (1989). Fetterly next filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho. Relief was denied, *Fetterly v.*

Paskett, 747 F. Supp. 594 (D. Idaho 1990); *Fetterly v. Paskett*, 747 F. Supp. 966 (D. Idaho 1990), and Fetterly appealed to the United States Court of Appeals for the Ninth Circuit.

While Fetterly's case was pending in the Ninth Circuit Court of Appeals, he initiated a new proceeding in the state trial court by filing a successive petition for post-conviction relief. In this petition he contended that he was entitled to retroactive application of the Idaho Supreme Court's decision in *State v. Charboneau*, 774 P.2d 299 (1989). In *Charboneau*, the Idaho court established a new review procedure which required sentencing courts to specify in capital cases that all mitigating evidence was considered against each individual aggravating factor found. The trial court summarily dismissed Fetterly's petition and he appealed to the Idaho Supreme Court. The state moved to dismiss the appeal on the ground that it was procedurally barred by Idaho Code § 19-2715, which prohibits successive post-conviction petitions in capital cases, except those which present issues that were not known and could not reasonably have been known prior to the defendant's direct appeal.[1]

Following oral argument, the Court of Appeals withdrew from submission Fetterly's federal habeas appeal. The parties were instructed to file new briefs when the

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[1] Section 19-2715 was intended to prevent repetitive post-conviction proceedings and appeals in capital cases by requiring persons sentenced to death to raise all collateral issues prior to the hearing of the direct appeal and sentence review. Failure to comply results in forfeiture of omitted issues. *State v. Beam*, 766 P.2d 678 (Idaho 1988), *cert. denied*, 489 U.S. 922 (1989).

state supreme court acted on Fetterly's attempt to appeal the trial court's refusal to consider his successive post-conviction claim. In the meantime, a stay of execution remained in effect.

The Idaho Supreme Court dismissed Fetterly's state appeal by its decision of December 19, 1991. *Fetterly v. State*, 825 P.2d 1073 (Idaho 1991), *reh'g denied* (1992). The court held that the *Charboneau* rule was not retroactively applicable to cases that were final at the time it was decided, adopting the rationale of *Griffith v. Kentucky*, 479 U.S. 314 (1987). The court also pointed out that the claim had been waived because it reasonably should have been known at the time of Fetterly's post-conviction proceeding but was not timely raised. 825 P.2d at 1073. Fetterly filed a new petition in this Court for a writ of certiorari, while the Ninth Circuit continued to hold Fetterly's habeas appeal out of submission. Fetterly's petition for a writ of certiorari was denied. *Fetterly v. Idaho*, 113 S. Ct. 607 (1992).

On July 9, 1993, the Court of Appeals issued its opinion holding that the district court erred by refusing to grant Fetterly a stay characterized by the Court of Appeals as one which would have been "predicated on a cognizable claim that in enacting and enforcing § 19-2515(c), Idaho has created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment," App. 16. Accordingly, the court held:

> It was an abuse of discretion for the district court to deny Fetterly's request for a stay. First, contrary to the district court's view that the sentencing court's failure to follow Idaho Code § 19-2515(c) does not raise an issue cognizable

> under habeas, we conclude it does. Our conclusion in this respect rejects the district court's legal reason for its denial. A decision based on a misapprehension of the law may constitute an abuse of discretion. [citation omitted] Second, Fetterly was represented through the filing of his petition in federal court by the same attorney who represented him when the *Charboneau* error may have been committed. As Fetterly now states, this raises the specter of ineffective assistance of counsel. *Id.*

The state petitioned for rehearing and suggested rehearing *en banc*. On January 24, 1994, the court denied the petition for rehearing and rejected the suggestion for rehearing *en banc*. Judge Kozinski, joined by Judges Hall and Wiggins dissented from the order rejecting the suggestion for rehearing *en banc*. Judge Kozinski wrote:

> The Supreme Court has told us in no uncertain terms that we may not delay a federal habeas proceeding so the petitioner can litigate unrelated claims in state court. *In Re Blodgett*, 112 S. Ct. 674, 676 (1992). Rather, our duty is "to take all steps necessary to insure a prompt resolution of the matter . . . " *Id.*
>
> * * *
>
> The panel's cold shouider to *Blodgett* is but the first of many errors. The opinion also manages to ignore or misapply *Estelle v. McGuire*, 112 S. Ct. 475 (1991); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982); *Teague v. Lane*, 489 U.S. 288 (1989); and *Godfrey v. Georgia*, 446 U.S. 420 (1980). It's as if the panel figured that, since it was just remanding, it didn't need to get the law right. But such wholesale disregard of Supreme Court precedent has

> no place among the published opinions of the United States Court of Appeals. And, sure enough, the mischief spawned by this opinion has not been long in coming. Like Frankenstein's monster, its rationale has overtaken even its creator. *Compare Hamilton v. Vasquez*, slip op. 1515 (9th Cir. Feb. 3, 1994) (majority opinion,) with *Id.* at 1551 (Trott, J., dissenting) (both opinions relying on *Fetterly*).
>
> Moreover, this is a remand order with important substantive consequences: The state's right to prompt adjudication of the habeas petition is permanently impaired and petitioner is allowed to shoehorn into his first habeas petition a claim that wasn't ripe when he litigated his case in the district court. This is not a case, then, where errors committed now can be corrected later; the panel's opinion permanently compromises the law of the case and the law of the Circuit. App. 21-22.

SUMMARY OF ARGUMENT

1. Whether Idaho Code § 19-2515(c) entitles the defendant to have all mitigation balanced separately against each aggravating factor proved is a matter of the application of state law. Thus, when the Court of Appeals held that Fetterly should have been granted a stay of execution by the United States District Court to allow him to exhaust in state court the question whether the death sentence should have been imposed on him under a retroactive application of a new interpretation of the statutory language, it violated the precedent set in *Estelle v. McGuire*, 112 S. Ct. 475 (1991), *Lewis v. Jeffers*, 110 S. Ct.

3093, *McCleskey v. Zant*, 111 S. Ct. 1454 (1991), and *In Re Blodgett*, 112 S. Ct. 764 (1992). The Court of Appeals holding expands the scope of federal review.

2. The Court of Appeals misapplied *Hicks v. Oklahoma*, 447 U.S. 343 (1980) in order to find that the Idaho Supreme Court violated the Due Process Clause by refusing to apply a change in state law retroactively to cases that had previously become final violated the Due Process Clause.

3. The issue whether Fetterly should receive a death sentence on balancing all mitigation against each aggravating factor could not be raised in state courts because the issue was procedurally defaulted under a state statute barring successive postconviction proceedings for issues not timely presented. The Court of Appeals made this state procedural bar wholly inoperative. The state has thus been deprived of an important procedural rule designed to prevent piecemeal litigation.

4. The Court of Appeals' novel application of *Hicks v. Oklahoma*, violated *Teague v. Lane*, 489 U.S. 288 (1989), barring federal habeas courts from applying new rules of constitutional law. Its holding that the omission of counsel to raise the balancing issue in state court was justification for staying federal proceedings to allow federal habeas counsel to apply to state courts for consideration of a defaulted issue violated *Murray v. Carrier*, 477 U.S. 478 (1986), which holds that the mere failure to raise an issue in state courts is not evidence of ineffectiveness of counsel.

5. The adverse effect of the Court of Appeals' holding on this Court's procedural default and "new rule" jurisprudence is a matter of general import, justifying consideration on a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

The Court Of Appeals Erroneously Applied The Due Process Clause In A Manner Which Allowed The Court To Consider Issues Of State Law, Bypass State Procedural Defaults, And Violate Governing Restrictions On Granting Stays Of Execution.

The manner in which a state court applies valid statutory aggravating factors in death sentencing cases is a matter of state law. Federal review is limited "to determining whether the state court's finding was so arbitrary as to constitute an independent due process or Eighth Amendment violation." *Lewis v. Jeffers*, 110 S. Ct. 3093, 3102 (1990). The application by a state court of valid aggravating factors is arbitrary or capricious "if and only if no reasonable sentencer could have so concluded." *Id.* at 3103. More broadly, the Court has "stated many times that 'federal habeas corpus relief does not lie for errors of state law.' " *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991). *See also, Barclay v. Florida*, 463 U.S. 939 (1983).

Decisions of this Court acknowledge the importance of the States' interest in the enforcement of the judgments of their courts. *See McCleskey v. Zant*, 111 S. Ct. 1454 (1991). The Court has emphasized that federal habeas review strikes at the finality of such judgments when it

fails to place on petitioners the burden of reasonable compliance with state procedural rules. *Id.* at 1469. The Court's procedural default jurisprudence protects the States' interest in the enforcement of procedural rules designed to insure reasonable finality of judgments by precluding federal habeas consideration of issues defaulted in state courts or issues not exhausted in state courts. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Rose v. Lundy*, 455 U.S. 509 (1982). The Ninth Circuit was admonished by *In Re Blodgett*, 112 S. Ct. 674 (1992) that it was not entitled to stay federal habeas proceedings while the petitioner raised new claims in state courts. The Court explained that "[a]dherence to [the decisions in *Rose* and *McCleskey*], and their prompt enforcement by the district courts and courts of appeals, will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for accommodating multiple filings." 112 S. Ct. at 676.

The holding of the Court of Appeals requires a federal district court to grant a habeas petitioner a stay of execution while he attempts to litigate in state courts questions of state law which have been forfeited under state procedural rules and accordingly will not be considered further by state courts. The judgment plainly raises questions of impermissible habeas consideration of issues of state law, *Lewis v. Jeffers, supra; Estelle v. McGuire, supra,* violation of the *Blodgett* holding, and failure to observe the state's procedural bar against litigation of new issues. Idaho Code § 19-2719. Notwithstanding the importance of the protection for the finality of state judgments afforded by this Court's cases, the Court of Appeals assumed authority over Fetterly's case because it believed that the

state had created a liberty interest in a particular procedure for balancing aggravating and mitigating factors which rendered inapplicable prohibitions on federal habeas review. The court concluded that Fetterly was deprived of due process of law because he was denied the benefit of a new balancing procedure for the reason that his case predated a decision of the Idaho Supreme Court which applied a new statutory interpretation to Idaho sentencing procedure.

The court's holding expands the scope of federal review and, by doing so, alters the meaning of this Court's decisions limiting such review. The decision below will prevent the State of Idaho and similarly situated states of the ninth circuit from enforcing procedural bars based on adequate and independent state grounds and will vitiate the prohibition against the application of new rules of constitutional law in federal habeas proceedings.

A. The Court Of Appeals Misapplied This Court's Precedent To Find That Idaho Code § 19-2515 Created A Liberty Interest In Balancing All Mitigation Against Each Aggravating Factor Individually.

The Court of Appeals was not correct in its conclusion that Idaho Code § 19-2515 created a liberty interest in having all mitigating evidence in a capital case balanced against each proven aggravating factor. Idaho Code § 19-2515(c) provides that "where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that

mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." This provision has remained unchanged since it was first enacted in 1977. In *State v. Sivak*, 674 P.2d 396 (Idaho 1983), *cert. denied*, 468 U.S. 1220 (1984), a case that was decided before Fetterly was sentenced to death, the Idaho Supreme Court, in response to an argument that a particular standard of proof should be applied to the process of weighing mitigating circumstances against aggravating factors, held that it was within the sentencer's discretion to balance aggravation and mitigation, "not pursuant to any special standard." 674 P.2d at 401 (citing *Zant v. Stephens*, 462 U.S. 862 (1983) and *Barclay v. Florida*, 463 U.S. 939 (1983)).

The Idaho Supreme Court has viewed capital sentencing as an act of guided discretion. In *State v. Osborn*, 631 P.2d 187 (Idaho 1981), which also predated Fetterly's sentencing, the Idaho Supreme Court described the process of balancing aggravation and mitigation as one in which the sentencer exercised a discretionary judgment about whether to impose the death penalty after reaching the point where discretion might be exercised by the finding of an aggravating factor:

> The weighing process, in our opinion does not involve shifting the burden of persuasion but is concerned instead with the presentation of relevant information to the sentencer in order that a reasoned and considered decision can be reached. The defendant's burden is merely to raise, in the aggravation-mitigation hearing, any factors which might possibly tend to mitigate his culpability for the offense. He has full opportunity to present and argue those factors.

> The court below then evaluates those factors under the guidelines set forth in the statute. His decision, including his reasoning, is then set forth in detail and this court reviews the entire process. While it is possible to speak of a "burden" of persuasion on the defendant to establish why he should receive leniency, we feel that, under our sentencing process, the facts speak for themselves once presented. The completeness of the evaluative process below and the mandatory review by this court, we feel, withstands constitutional scrutiny. 631 P.2d at 199.

Thus, in Fetterly's case the Idaho Supreme Court found that

> the findings of the trial court, in considering the death penalty under I.C. § 19-2515, reflect a rational dispassionate evaluation of the factual circumstances of the case and demonstrate a thorough consideration of all the relevant evidence produced at the sentencing hearing. There is no indication that sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. *State v. Fetterly*, 710 P.2d 1202, 1208 (Idaho 1985).

The Idaho Supreme Court's consistent interpretation of the sentencing process prevailed until 1989, at which time the court concluded in *State v. Charboneau*, 774 P.2d 299 (Idaho 1989) that, as a matter of statutory construction, Idaho Code § 19-2525(c) called for weighing all mitigating circumstances against each aggravating circumstance separately. Fetterly's case had become final before this, for which reason the Idaho Supreme Court held that *Charboneau* would not be applicable. *Fetterly v.*

State, 825 P.2d 1073 (Idaho 1993).[2] It was not until after Fetterly had filed a federal habeas petition that he filed a successive state petition for postconviction relief claiming a right to have the *Charboneau* sentencing procedure applied retroactively to his case. The United States District Court declined to grant a stay to allow Fetterly to file new claims in state court and Fetterly appealed to the Court of Appeals. While Fetterly's appeal was pending in the Ninth Circuit Court of Appeals, his state petition was summarily dismissed by the state district court. Fetterly attempted to appeal the dismissal, but the Idaho Supreme Court dismissed the appeal on the state's motion. *Fetterly v. State, supra.*

The Court of Appeals concluded that Fetterly's sentence was not imposed in accordance with Idaho Code § 19-2515, as interpreted by *Charboneau*, and that the dissonance between Fetterly's death sentence and those imposed after *Charboneau* generates an issue of federal law. The court reasoned that the state had created a liberty interest in the kind of balancing announced in *Charboneau* and that the failure to sentence Fetterly as post-Charboneau defendants were sentenced undermined the reliability interests announced in *Godfrey v. Georgia*, 446 U.S. 420 (1980) and related cases. The "error," as the Court of Appeals saw it, made it harder for mitigating

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[2] In *Charboneau*, the Idaho court did nothing different than would have been the case had the legislature changed the statute after Fetterly had been sentenced. It is clearly not the case that such events invariably call for retroactive application. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

factors in Fetterly's case to overcome the force of the proven aggravating circumstances.

The Court of Appeals' theory necessarily embodies the assumption that Idaho moved from an arbitrary capital sentencing system to a valid one with the announcement of the *Charboneau* decision. This judgment, however, cannot be sustained under this Court's decisions. The Idaho Supreme Court's view of the balancing process as one in which the sentencer exercised judgment guided by the finding of at least one aggravating factor, but not pursuant to any formal litany, did not result in the imposition of an unconstitutional sentence on Fetterly. There is no authority that requires a state to approach the process of balancing aggravation and mitigation differently than Idaho courts did prior to *Charboneau*. To the contrary, statutes of this kind have been approved because they provide appropriate guidance to the sentencing authority. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Walton v. Arizona*, 497 U.S. 639 (1990).[3] It is, moreover, a necessary implication of the decision below that Idaho Code § 19-2515 was

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[3] This Court has declined to impose on the States any particular kind of statutory structure or to require mathematical precision in the definition or application of statutory aggravating factors. *Cf., Arave v. Creech*, 113 S.Ct. 1534 (1993) (federal courts not authorized to review state cases to determine whether aggravating factor has been consistently applied); *Pulley v. Harris*, 465 U.S. 37 (1983) (a state may choose whether or not to employ comparative proportionality review of death sentences); *Spaziano v. Florida*, 468 U.S. 447 (1988) (a state may choose to permit the determination of penalty by a judge rather than by a jury); *Cabana v. Bullock*, 474 U.S. 376, 386-387 (1985) (state may provide for making requisite findings of culpability at the appellate stage of the proceedings).

correctly interpreted by *Charboneau* and incorrectly applied by previous Idaho courts. In order to reach this conclusion, the Court of Appeals was required to reevaluate the manner in which the Idaho court applied state law. This was an inquiry the Court of Appeals was not entitled to conduct. *Lewis v. Jeffers, supra.*

The central point of the decision below is that the state may violate the due process clause by not following its own law. *Hicks v. Oklahoma*, 447 U.S. 343 (1980) was cited by the court for the proposition that Idaho created a federal interest in "Charboneau balancing" by the enactment of Idaho Code § 19-2515, and violated that interest when it did not afford its benefits to Fetterly. The Court of Appeals misinterpreted *Hicks* and applied it in a manner contrary to this Court's precedents and those of other circuits.

Fetterly was not treated differently than any other capital defendant who was sentenced prior to the decision in *Charboneau*. In *Hicks*, however, the defendant was singled out by an erroneous application of state law with the consequence that he was denied a right, available to everyone else, to have a jury determine his sentence under circumstances that would likely have resulted in the imposition of a significantly shorter sentence. The Court's conclusion that Hicks was denied due process in these circumstances cannot easily be separated from the fact that Hicks was denied a substantive benefit available to everyone else being sentenced under contemporaneous law. A demand for retroactive application of a subsequent change of law presents a very different situation.

The Court has had several occasions to explain the meaning of *Hicks* and the explanations afford little support for the Court of Appeals reading of the case. In *Cabana v. Bullock*, 474 U.S. 376 (1986) the Court observed that in *Hicks* it "held only that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Unlike the defendant in Hicks, Bullock had no state-law entitlement at the time of his trial to have the jury (or, indeed, anyone at all) make the Enmund findings." 474 U.S. at 387, n.4.[4]

Cf. Clemons v. Mississippi, 494 U.S. 738 (1990) (*Hicks* stands for the proposition that when a state creates a liberty interest in having a jury impose punishment, the interest cannot be overcome by conjecture that the defendant might have received the same sentence had the interest been observed); *Ross v. Oklahoma*, 487 U.S. 81 (1988) (*Hicks* is satisfied when the defendant receives all that is due under state law.)

The Court of Appeals decision is inconsistent with the precedent of other circuits. In *Geschwendt v. Ryan*, 967 F.2d 877 (3d Cir. 1992) it was similarly argued that a change in the way a state court interpreted state law

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[4] The Court of Appeals, of course, seemed to think that Idaho Code § 19-2515 contained a state entitlement to cumulative balancing of mitigating factors at the time Fetterly was sentenced. As noted previously, reaching this conclusion required the court to ignore the injunction of *Lewis v. Jeffers, supra*, against intruding on matters of state law, for the Idaho Supreme Court, wrongly or not, applied the statute differently prior to *Charboneau*.

required that the change reach back retroactively to cases decided earlier. In Pennsylvania, which has an insanity defense, the law did not require that the jury be given an instruction on the insanity defense at the time Geschwendt was convicted. Later, the Pennsylvania Supreme Court held that defendants relying on insanity were entitled to a specific charge on the availability of a verdict of not guilty by reason of insanity. This change of law was not retroactive in Pennsylvania. Geschwendt urged the Court of Appeals for the Third Circuit to find that he had been deprived of a liberty interest without due process because the change of law was not applied to him retroactively. These factual circumstances are virtually identical to those considered by the Ninth Circuit in Fetterly's case. The Third Circuit, however, declined to accept the theory of the Due Process Clause on which the decision below is based:

> We recognize that in *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L.Ed.2d 175 (1980), a due process claim was based on an error of state law. In *Hicks*, the jury was instructed that if it found the defendant guilty of distributing heroin, it must sentence him to a forty year term as a habitual offender whereas, under the retroactively effective state law, the jury could have sentenced him to a term of not less than ten years. Clearly *Hicks* is distinguishable from this case, for in *Hicks* the jury was given an erroneous instruction on substantive state law which forced it to return a verdict for a sentence four times longer than required, a fundamental error indeed. At Geschwendt's trial, however, the court properly defined insanity and correctly informed the jury that it could not find

> Geschwendt guilty unless the Commonwealth proved beyond a reasonable doubt that he was sane. Thus, unlike the instructions in Hicks, the charge in Geschwendt's case did not compel the jury to reach a result that it might have otherwise rejected. To the contrary, the court told the jury to return a not guilty verdict if the Commonwealth did not prove Geschwendt was sane and he was substantively entitled to nothing more. 967 F.2d at 890.

Fetterly, of course, received a sentence that was plainly constitutional as a matter of federal law.

The Fifth Circuit, in *Mendiola v. Estelle*, 635 F.2d 487 (1981), held that *Hicks v. Oklahoma* did not apply to a prisoner who had received all of the substantive protections due under state law. In *Hill v. Estelle*, 653 F.2d 202 (1981), the Fifth Circuit pointed out that a state court's failure to follow its own procedural rules does not of itself raise a federal constitutional question cognizable in habeas corpus. Presumably, the Ninth Circuit takes the position that Fetterly's claimed right to have all mitigating factors balanced against each aggravating factor separately is a matter of substantive interest. But the notion that *Hicks* extends that far is rebutted by the decisions in *Estelle*, *Jeffers* and *Creech* that the consistent application of state aggravating factors is not an issue of federal law.

In sum, the view of the Court of Appeals that *Hicks v. Oklahoma* supports the theory that Idaho created a liberty interest in the kind of balancing of aggravating and mitigating factors described in *Charboneau* is incorrect. As Judge Kozinski points out, *Hicks v. Oklahoma* "only prevents a state court from denying an isolated defendant

the benefit of a state law that applies to everyone else." App. 30. *Hicks* was substantially disadvantaged because he did not get a jury determination of sentence which would have included an exercise of sentencing discretion. Fetterly, on the other hand, was not singled out. Sentence was imposed upon him as on other capital defendants in Idaho prior to the decision in *Charboneau*.

There is another reason why *Hicks v. Oklahoma* has been overextended by the Ninth Circuit Court of Appeals. It is that the Court of Appeals has found a substantive due process problem with a procedural matter of more theoretical than practical impact. Under Idaho's sentencing law the finding of a statutory aggravating factor begins the inquiry into whether the death sentence will be imposed. After that point, the court must have some discretion to apply factors of leniency, *Lockett v. Ohio*, 438 U.S. 586 (1978). Within those strictures, a state has the discretion to structure its system in its own way. *Cabana v. Bullock, supra*. The Idaho statute provides that "where the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust. Idaho Code § 19-2515(c).

The statute calls for a simple, commonsense judgment by the trial court, whether, given the presence of a statutory aggravating factor, there is nonetheless sufficient extenuation that the death sentence should not be imposed. *Cf. People v. Melton*, 750 P.2d 741 (California 1988) (process is normative, not mechanical). The *Charboneau* weighing process has little prospect of changing

the outcome of a sentencing decision. Under *Charboneau* the sentencing authority is told that all the mitigation must be weighed against each aggravating factor, as though it were possible to somehow assign objective weight to both mitigating and aggravating circumstances. But this is not an accurate description of the way a sentencing judge makes a death sentencing decision. Rather than attempting to ascribe particular weight to mitigating factors the sentencer is most likely, whether under *Charboneau* or prior law, to first determine whether an aggravating factor is present and then, in the exercise of discretion, make a judgment whether the mitigating evidence is sufficiently compelling to justify not imposing the death sentence.

The principal effect of *Charboneau*, accordingly, has been to encourage sentencing courts to specify that each aggravating factor found is independently sufficient to support the death penalty, for which reason the failure of one of the multiple aggravating factors would not call for the supreme court to set aside the death sentence. *See State v. Card*, 825 P.2d 1081 (Idaho 1991), rehearing denied (1992), *cert. denied, Card v. Idaho*, 113 S. Ct. 321 (1992). The fact that *Charboneau* does not produce an important substantive change in the sentencing process is important under *Hicks*, because the lack of prejudice arising from a particular procedure helps to determine whether there has been a due process violation. *Cf. Kelsie v. Trigg*, 657 F.2d 155 (7th Cir. 1981) (failure to follow state requirement to submit the question of appropriate punishment to the jury did not violate due process where the error did not prejudice the defendant.) The Court of Appeals did not consider whether the *Charboneau* process would

likely have made any difference in Fetterly's sentence. It concluded that this was the case without thorough analysis of the sentencing process.

B. The Court of Appeals Decision Impairs The Ability of the State to Enforce Procedural Rules Intended to Prevent Piecemeal Litigation

The decision of the Court of Appeals has implications that are especially grave for Idaho and similarly situated states of the Ninth Circuit. The decision effectively invalidates Idaho Code § 19-2719, a statute enacted in response to *Barefoot v. Estelle*, 463 U.S. 880 (1983) to prevent piecemeal litigation of potential federal constitutional claims. The Idaho courts dismissed Fetterly's attempt to litigate his claim that the *Charboneau* balancing formulation should be retroactively applied to his case because Idaho Code § 19-2719 did not allow it.[5] The Court of Appeals decision effectively authorizes a federal stay of execution in a death penalty case while habeas petitioners attempt to present procedurally barred claims to state courts.

The decision creates a serious obstacle to the enforcement of any death penalty judgment. A capital prisoner need only assert that the state has applied its death sentencing statute arbitrarily and or has changed the statutory procedures and not retroactively applied the

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[5] The Court of Appeals seems to have assumed that Fetterly's claim was considered on the merits by the Idaho Supreme Court. That court, however, *dismissed* Fetterly's appeal, an action consistent only with a refusal to reach the merits of the claim. *See also State v. Paz*, 852 P.2d 1355 (Idaho 1993).

new law. This results in a stay of execution to allow the defendant to present a new petition to state court, even in circumstances where state law does not permit such litigation. The defendant then duly presents futile claims to state courts, is turned away on independent state grounds, and then resumes his federal habeas proceeding. But even at this point there is nothing to require disposition because the petitioner can now "discover" a new issue that was not presented to the courts and apply again to hold habeas proceedings in abeyance, under the protection of a stay, while he petitions the state courts to take up additional defaulted issues. This consequence of the Court of Appeals decision cannot be reconciled with *McClesky v. Zant*, 111 S. Ct. 1454, 1499 (1991) in which the Court explained that "our federal system recognizes the independent power of a state to articulate societal norms through criminal law; but the power of a state to pass laws means little if the state cannot enforce them."

The Court of Appeals judgment expands the concept of federal questions to a degree that would require federal habeas courts to exercise supervisory control over the way state courts apply their capital sentencing statutes. Because omitted issues falling under the broad umbrella of the concept of "possible arbitrariness" become cognizable under the court's formulation, virtually anything can be litigated. *Cf. Spencer v. Texas*, 385 U.S. 554, 563-564, (1967) (court not a rule making organ for the promulgation of state rule of criminal procedure); *Estelle v. McGuire, supra*. The Court of Appeals, as Judge Kozinski points out in his dissent, extends *Hicks* in a manner inconsistent with *Estelle v. McGuire*.

Judge Kozinski also calls attention to the extreme consequences of the decision:

> [T]he panel's holding that any new interpretation of the sentencing law must apply retroactively to all inmates on death row has alarming implications. Not only will every reinterpretation or amendment of the capital sentencing statute give each inmate on death row a right to demand resentencing and start the process of collateral and tertiary review from scratch, but it also will make state supreme courts think twice about their rulings. Much as they may want to give the statute a narrowing interpretation or construe it to operate more fairly, state supreme court justices will have to consider that every defendant awaiting execution will have to be resentenced under that new interpretation. App. 33-34.

The court's weakening of procedural default rules affects non-capital cases as well, potentially making federal habeas the dominant proceeding in every state criminal prosecution.

II.

The Court of Appeals Applied New Rules In Violation of *Teague v. Lane*

Hicks v. Oklahoma has been applied in such a novel way that the decision of the Ninth Circuit violates *Teague v. Lane*, 489 U.S. 288 (1989). *See Stringer v. Black*, 112 S. Ct. 1130 (1992); *Graham v. Collins*, 113 S. Ct. 892 (1993) (earlier precedent used in a novel setting, thereby extending the precedent, is defined as a new rule of constitutional law). The court's holding that state courts "violate due process

and the Eighth Amendment when they refuse to apply a new construction of a criminal sentencing statute retroactively to defendants whose decisions have become final," and that "*Godfrey* requires a state to apply any changes in its death sentencing statute [retroactively,]" (Kozinski, J., dissenting) (App. 35, 36) is at least a novel extension of *Griffith, Trevino v. Texas*, 112 S. Ct. 1547 (1992) and *Godfrey*.

The holding violates *Teague* both by the rule it applies and by treating the *Teague* issue as one that must be considered in the district court after remand. This Court has stated that *Teague* presents a *threshold* question whether a new rule is being applied, to be resolved *before* the court proceeds to apply the new rule. *Stringer v. Black*, 112 S. Ct. 1130 (1992); *Teague, supra*. There is no reason to believe that Fetterly could establish any exception to *Teague*.

The lower court's revision of the *Teague* bar almost nullifies the prohibition against applying new rules in federal habeas proceedings. If *Teague* is to be treated as a *bar*, it cannot be applied as secondary question to be considered after the court has reached the merits of the new rule.

The Court of Appeals also applied a new rule by holding that the "specter of ineffective assistance of counsel," (App. 17) is a basis for permitting federal habeas counsel to pursue issues defaulted in state courts. This Court has held that the mere omission of issues in state courts is not tantamount to ineffective assistance. *Murray v. Carrier*, 477 U.S. 478 (1986). Contrary to this, the Court of Appeals seems to hold that the omission of Fetterly's trial attorney to argue the *Charboneau* view of § 19-2515(c)

justifies excusing the default "to allow Fetterly's new attorney to advance claims missed by the attorney who overlooked them." App. 17. This is certainly a novel application of 28 U.S.C. § 2243 because the court uses the "disposition as justice requires" language of the statute to create an entirely new exception to *Wainwright v. Sykes*, *supra*, and following cases.

CONCLUSION

The petition for Certiorari should be granted and this Court should vacate the judgment of the Court of Appeals, either summarily or after hearing.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD KENNETH FETTERLY, *Petitioner/Appellant,* v. DAVID PASKETT, WARDEN, IDAHO STATE PRISONS; and JIM JONES, Attorney General of the State of Idaho, *Respondents/Appellees.*	No. 90-35627 D.C. No. CV-89-1106-MJC OPINION

Appeal from the United States District Court
for the District of Idaho
Marion J. Callister, District Judge, Presiding

Argued April 10, 1991
San Francisco, California
Submission deferred April 25, 1991
Reargued and Submitted
March 31, 1993 – Boise, Idaho

Filed July 9, 1993

Before: Mary M. Schroeder, Edward Leavy, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals issued a limited remand to the district court. The court held that the district court abused its discretion in denying a petitioner's motion for a stay of federal habeas corpus proceedings that was predicated on a cognizable claim of a protected liberty interest in the manner in which mitigating and aggravating circumstances were weighed in the imposition of his death sentence.

Appellant Donald Fetterly was convicted of murder in Idaho state court in December 1983. Three aggravating circumstances were found. Mitigating circumstances were also found. The sentencing court weighed the aggravating factors against the mitigating factors and determined that the latter did not outweigh the former. On that basis, Fetterly was sentenced to death. Fetterly pursued state postconviction remedies.

In April 1989, *State v. Charboneau*, 774 P.2d 299, *cert. denied*, 493 U.S. 923 (1989), disapproved the manner in which Fetterly was sentenced, holding that the Idaho statute required the weighing of mitigating factors against *each* aggravating circumstance found.

Fetterly's first federal habeas corpus petition was filed a few days after *Charboneau* by the attorney who had represented him throughout. It did not allege *Charboneau* error. A second attorney joined Fetterly's case some months later and discovered the *Charboneau* issue. Soon

thereafter, Fetterly filed a second state petition on grounds of *Charboneau* error and ineffective assistance of counsel. Fetterly also requested the district court to stay proceedings on his federal petition until the new issues were exhausted in the state system and could be properly alleged in his federal petition. The court denied the request, holding that none of the new issues was of constitutional dimension, and specifically that the *Charboneau* issue was a matter of state law exclusively. The court then denied Fetterly's original petition on the merits, and Fetterly appealed.

Because Fetterly's second state petition was pending on appeal before the Idaho Supreme Court, after initial argument the court of appeals deferred submission pending that court's decision, which went against Fetterly in December 1991. The Idaho court held that *Charboneau* was a new rule not retroactively applicable to Fetterly. The court of appeals heard oral argument in March 1993.

[1] Based on oral argument and the record, the appropriate steps at this juncture were a limited remand to the district court to permit Fetterly to amend his petition to add the newly exhausted claims and to permit that court to adjudicate those and any directly related claims. Fetterly's other claims were held in abeyance to avoid piecemeal litigation.

[2] A strong argument emerged that Fetterly's sentence was not determined in accord with Idaho law, since it was undisputed that the sentencing court did not engage in the balancing prescribed by statute. That

appeared to create a federal constitutional issue cognizable on habeas corpus, [3] since the constitutional requirement of similar sentences in similar cases may not have been met. [4] Idaho was not compelled to approach the balancing issue as it did in its statute, but its failure to conform to its own statutory mandates might implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation through state action.

[5] In light of those legal conclusions and the fact that Fetterly's first attorney, now no longer representing him, may have been ineffective with respect to the *Charboneau* issue, the appropriate course was to permit Fetterly's new attorney to pursue those claims.

COUNSEL

Thomas J. McCabe, Westberg, McCabe & Collins, Boise, Idaho; David J. Burman, Perkins Coie, Seattle, Washington, for the petitioner-appellant.

Lynn E. Thomas, Solicitor General, Office of the Attorney General of the State of Idaho, Boise, Idaho, for the respondents-appellees.

OPINION

TROTT, Circuit Judge:

Donald Fetterly comes to us sentenced to death by the State of Idaho. Among his claims on appeal from a denial by the district court of his petition for a writ of habeas corpus is a claim that he should have been

granted a stay to exhaust in state court newly identified Constitutional claims. Fetterly's newly appointed counsel had discovered these claims and wanted to include them in Fetterly's petition. Counsel's request for a stay was denied, and Fetterly's petition was not amended. These new claims relate to admitted irregularities in the manner in which the sentencing court determined Fetterly must die for the murder of Sterling Grammer.

We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 2253 (1988), and we order a limited remand to the district court with instructions to permit Fetterly to amend his petition so he may litigate his newly exhausted claims.

I

On December 15, 1983, Donald Fetterly was convicted by a jury in Idaho of the premeditated murder of Sterling Grammer. In a subsequent sentencing hearing, the trial court sitting without a jury found as statutorily aggravating circumstances that (1) the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity; (2) the defendant exhibited utter disregard for human life; and (3) the murder was committed during the commission of a felony, i.e., burglary, and was accomplished by the specific intent to cause the death of a human being. *See* Idaho Code § 19-2515(g)(1)-(10). The trial court sentenced Fetterly pursuant to Idaho Code § 19-2515. Section 19-2515(c) provides:

> Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at

> least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

Because the trial court determined that the "mitigating circumstances [found in Fetterly's favor] do not outweigh the gravity of the aggravating circumstances," it sentenced Fetterly to death. Fetterly's conviction and his death sentence were affirmed by the Supreme Court of Idaho, *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), *cert. denied*, 479 U.S. 870 (1986), and his first attempt to secure post-conviction relief was unsuccessful. *State v. Fetterly*, 115 Idaho 231, 766 P.2d 701 (1988), *cert. denied*, 492 U.S. 925 (1989).

II

On April 10, 1989, Fetterly filed a petition for a writ of habeas corpus in the District Court for the District of Idaho that is the subject of this appeal. The lawyer who filed the petition was the same lawyer who had represented Fetterly at every stage of the case in state court.

On October 17, 1989, a second lawyer entered this case on behalf of Mr. Fetterly, Mr. Thomas J. McCabe. He was appointed pursuant to 21 U.S.C. § 848(q)(4)(B), and (5)(6)(7). As Mr. McCabe stated during oral argument, he was new to the case, and thus, gave it "a fresh look." As he did, he concluded that the trial court erred with respect to the manner in which it weighed the mitigating

circumstances against the aggravating ones. Instead of weighing the mitigating circumstances collectively against *each* of the aggravating circumstances separately, as required by Idaho Code § 19-2515(c), the sentencing judge had weighed all the mitigating circumstances against all the aggravating circumstances together as a group.

Mr. McCabe's recognition of this error was aided no doubt by the decision of the Supreme Court of Idaho in *State v. Charboneau*, 116 Idaho 129, 774 P.2d 299, *cert. denied*, 493 U.S. 923 (1989). *Charboneau* was decided on April 4, 1989, just 6 days before Fetterly's first attorney filed Fetterly's petition for a writ of habeas corpus in federal district court, and before Mr. McCabe entered the case. In *Charboneau*, the Supreme Court of Idaho explicitly disapproved of the weighing approach to aggravating and mitigating circumstances taken by the sentencing judge in the instant case. The court said: "If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a group, it would have referred to 'the aggravating circumstances found.' The plain meaning of the statute dictates our conclusion on this issue." 734 P.2d at 323.

When Mr. McCabe discovered the possible presence of "*Charboneau* error," as it is now called in Idaho, he took two steps on behalf of his client. On June 15, 1990, he filed a second state petition for post-conviction relief alleging, *inter alia*, *Charboneau* error and ineffective assistance of counsel; and on June 20, 1990, he requested the federal district court to stay the resolution of his pending petition to allow him to exhaust Fetterly's state remedies on the newly identified issues. Mr. McCabe's goal in

requesting a stay was to exhaust all his federal constitutional claims in state court and then to present them in a single proceeding for review in the federal court. In so doing, he would have avoided any claim by Idaho that any second petition would be defective as "abusive." *See McCleskey v. Zant*, 111 S. Ct. 1454, 1465-66 (1991). Mr. McCabe also recognized that if he moved to amend his petition in federal court, it would have been subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982) because it contained unexhausted claims.

On June 26, 1990, the district court denied Fetterly's stay pending further argument. On August 1, 1990, the denial of the stay was made final on the ground that, as a matter of law, none of the new issues raised were matters of federal Constitutional dimension and thus were not cognizable under habeas corpus. The district court in a *"sua sponte"* decision stated that the *Charboneau* problem was exclusively a matter of state law. *Fetterly v. Paskett*, 744 F.Supp. 966, 976 (D. Idaho 1990) (citing *Pulley v. Harris*, 465 U.S. 37, 41-42 (1984). Fetterly was not given an opportunity directly to brief or to argue this pivotal issue prior to the district court's adverse ruling. Subsequently, the district court denied Fetterly's original petition on the merits, *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), and Fetterly filed this timely appeal. One of the issues raised, and the only issue we decide in this opinion, is whether the district court abused its discretion in rejecting Fetterly's motion for a stay pending exhaustion of newly discovered issues.

III

We heard argument for the first time on April 10, 1991. At that time, Fetterly's second state post-conviction petition for relief, based primarily on *Charboneau* error, coupled with a claim of ineffective assistance of counsel, was pending before the Supreme Court of Idaho. Because a determination of this issue in Fetterly's favor would have mooted this appeal, we deferred submission pending a decision of the Supreme Court of Idaho.

On December 19, 1991, Fetterly lost his appeal. *See Fetterly v. State*, 121 Idaho 417, 825 P.2d 1073 (1991), *cert. denied*, 113 S.Ct. 607 (1992). In a divided opinion, the Supreme Court of Idaho determined that its holding in *Charboneau* constituted a "new rule." Citing *Griffith v. Kentucky*, 479 U.S. 314 (1987) with respect to the implications of a "new rule" on retroactivity, the Supreme Court of Idaho refused to apply Idaho Code § 19-2515(c) to Fetterly's case because his case was "final prior to the issuance of *Charboneau*."[1] *Id.* at 1075. The court also

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[1] The "new rule" doctrine on which the Supreme Court of Idaho relied relates to "new *constitutional* rule[s] of criminal procedure." *Teague v. Lane*, 489 U.S. 288, 299 (1989) (emphasis added). The holding in *Charboneau* is not connected to any Constitutional commands. In addition, the United States Supreme Court has described a "new rule" as a ground-breaking rule not dictated by precedent. *See Penry v. Lynaugh*, 492 U.S. 302, 314 (1989). The Idaho Supreme Court opinion describes Fetterly's claim as one that should have been known immediately after his trial.

It appears that Fetterly did not seek to take advantage of any new rights or opportunities created by *Charboneau*, but only of an existing right stated in the statute itself. Idaho Code § 19-2515(c). Thus it is difficult for us to understand why the

concluded that Fetterly's ineffective assistance of counsel claim had been waived. *Id.* Fetterly's subsequent petition to the United States Supreme Court for a writ of certiorari was denied on November 30, 1992. *Fetterly v. Idaho*, 113 S. Ct. 607 (1992).

[1] After the Idaho Supreme Court made its determination on Fetterly's claim of *Charboneau* error, we scheduled oral argument in Boise, Idaho on March 31, 1993. Based on that argument and the record in this case, we have determined as explained below that the appropriate steps at this juncture are: 1) to order a limited remand to the district court to permit Fetterly to amend his petition to add the newly exhausted claims; and 2) to order the district court to adjudicate those claims and any issues directly related to them. We will hold in abeyance a determination on Fetterly's other claims which we conclude were fully developed in the district court. In so doing, we avoid piecemeal adjudication in the court of appeals.

IV

With respect to matters involving Idaho Code § 19-2515(c) and Fetterly's other newly exhausted claims,

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Idaho Supreme Court utilized a retroactivity analysis. There may, however, have existed some other reason to deny Fetterly the benefit of the statute, such as procedural default as outlined by Justice Johnson in his separate opinion concurring in the result based on Idaho Code § 19-2719, *Fetterly*, 825 P.2d at 1075 (Johnson, J., concurring). We mention our concerns because of the rule that any independent state ground barring federal habeas consideration be both "adequate" and "independent." *Coleman v. Thompson*, 111 S. Ct. 2546, 2553-54 (1991).

the only issue before us is whether the district court committed error in rejecting Fetterly's new counsel's request for a stay so that these new issues could be exhausted as a prelude to filing a unitary amended petition in federal district court. Because of the district court's *sua sponte* ruling, no such amended petition has ever been filed. Thus, we are limited to deciding whether Fetterly presented the district court with claims cognizable under habeas, and whether, under the circumstances of this case, it was an abuse of discretion to deny him the opportunity to exhaust these claims and thereafter amend his petition.

A.

[2] Comparing the mandate of Idaho Code § 19-2515(c) as confirmed in *Charboneau*, concerning the manner in which an Idaho judge considering the imposition of the death penalty must approach the task of weighing mitigating against aggravating circumstances, with what the sentencing judge did in this case, a strong argument emerges for the proposition that Fetterly's sentence was not determined in accord with the requirements of Idaho law. To quote a dissenting Justice of the Supreme Court of Idaho, "No one disputes that the [state] district court did not engage in the balancing procedure mandated by the legislature in I.C. § 19-2515(c)." *Fetterly v. State*, 825 P.2d at 1081 (Bistline, J., dissenting on denial of petition for rehearing). Setting aside for a moment the procedural complexities in which this issue is now enveloped, this dissonance with Idaho sentencing law appears to create a federal Constitutional issue cognizable on habeas corpus.

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Supreme Court held that states can impose the death penalty for certain crimes without running afoul of our Constitutional prohibition against cruel and unusual punishment, but only if the manner in which the penalty is selected "provide[s] a meaningful basis for *distinguishing* the few cases in which [the penalty] is imposed from the many cases in which it is not." *Id.* at 427 (emphasis added) (internal quotations omitted) (alterations in original). As pointed out by Justice Stevens, "this Court's decisions have made clear that States may impose this ultimate sentence *only if they follow procedures* that are designed to assure reliability in sentencing determinations." *Barclay v. Florida*, 463 U.S. 939, 958-959 (1983) (Stevens, J., concurring) (emphasis added). Part of the requirement of reliability is " 'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.' " Id. at 954 (plurality opinion) (alterations in original) (quoting *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) (internal quotations omitted).

[3] Because Fetterly may not have been sentenced to death as prescribed by Idaho Code § 19-2515(c), this goal of similar sentences in similar cases may not have been met. If the sentencing judge did not follow Idaho's statutory procedures in Fetterly's case, others similarly sentenced in Idaho have been and will necessarily be treated differently if mitigating circumstances in their respective cases are grouped against each aggravating circumstance, rather than against the aggravating circumstances, as a whole. In fact, after *Charboneau* the Supreme Court of

Idaho has reversed several sentences for § 19-2515(c) error and remanded for resentencing. *See, e.g., State v. Fain*, 116 Idaho 82, 774 P.2d 252, *cert. denied*, 493 U.S. 917 (1989); *State v. Leavitt*, 116 Idaho 285, 775 P.2d 599, *cert. denied*, 493 U.S. 923 (1989); *State v. Sivak*, 119 Idaho 320, 806 P.2d 413 (1990); *Stuart v. State*, 118 Idaho 865, 701 P.2d 1216 (1990). Moreover, such an error necessarily made it harder for the mitigating circumstances found in Fetterly's favor to overcome the aggravating circumstances, because the latter were weighed as a group rather than separately as required by the controlling statute. Other persons sentenced to death in Idaho are not required to overcome this higher hurdle.

[4] There is, of course, nothing in the Constitution of the United States that requires Idaho's legislature to approach balancing as it has done in Idaho Code § 19-2515(c). However, the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state. Ninth Circuit precedent generally supports this proposition. In *Ballard v. Estelle*, 937 F.2d 453 (9th Cir. 1991), we said, "[Petitioner's] claim that his sentence violated California sentencing laws because a different definition of 'personal use' of a firearm was used than California has adopted in other cases sets forth a cognizable federal habeas corpus claim based on the due process clause of the Fourteenth Amendment." *Id.* at 456. *See also Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir. 1991) ("[F]ederal courts sitting in habeas can and will review an application of state law for alleged constitutional violations. Federal courts [,however,] are extraordinarily chary of entertaining habeas corpus violations

premised upon asserted deviations from state procedural rules." (citations omitted.)) To paraphrase *Hicks v. Oklahoma*, 447 U.S. 343 (1980), where a state has provided a specific method for the determination of whether the death penalty shall be imposed, "it is not correct to say that the defendant's interest" in having that method adhered to "is merely a matter of state procedural law." *Id.* at 346.

The very purpose of statutes such as Idaho Code § 19-2515(c) is to comply with the exacting requirements of the Constitution of the United States as articulated by the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny. Moreover, when we deal with matters involving aggravating and mitigating circumstances, we are at the very core of the Supreme Court's mandate that the death penalty be determined based on the character of the offender as well as the circumstances of the offense. To quote the Court:

> [D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

> This Court has previously recognized that [f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 303-305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citations omitted). Furthermore, "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be

taken or spared, that discretion must be suitably *directed* and *limited* so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added).

In response to these imperatives, Idaho's legislature has "directed" the manner in which aggravating and mitigating circumstances shall be weighed, and it has "limited" imposition of the death penalty to those specific situations where "the trial court finds that all the mitigating circumstances do not outweigh the gravity of each of the aggravating circumstances found." *Charboneau*, 774 P.2d at 323 (Bistline, J., dissenting). For whatever reason, Idaho has chosen to prohibit the grouping of aggravating circumstances in connection with their weighing against whatever elements of mitigation that appear in a given case; and "[w]hen the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." *Stringer v. Black*, 112 S. Ct. 1130, 1137 (1992). Thus, we conclude that Fetterly's motion for a stay was predicated on a cognizable claim that in enacting and enforcing § 19-2515(c), Idaho has created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment.

B.

[5] In the light of the foregoing, we respectfully conclude that for two reasons it was an abuse of discretion for the district court to deny Fetterly's request for a

stay. First, contrary to the district court's view that the sentencing court's failure to follow Idaho Code § 19-2515(c) does not raise an issue cognizable under habeas, we conclude it does. Our conclusion in this respect rejects the district court's legal reason for its denial. A decision based on a misapprehension of the law may constitute an abuse of discretion. *Northern Alaska Envtl. Ctr. v. Lujan*, 961 F.2d 886, 889 (9th Cir. 1992). Second, Fetterly was represented through the filing of his petition in federal district court by the same attorney who represented him when the *Charboneau* error may have been committed. As Fetterly now states, this raises the specter of ineffective assistance of counsel. If Fetterly has lost the benefit of Idaho Code § 19-2515(c), it may be because of an omission by his original attorney to spot the error of the sentencing judge. Under the circumstances, we believe the only appropriate course for the district court was to allow Fetterly's new attorney to advance claims missed by the attorney who overlooked them. We note that Fetterly's original attorney bowed out of the case after Mr. McCabe's discoveries. In this respect, we follow the text of the federal habeas statute which enjoins us to "dispose of the matter as law *and justice* require." 28 U.S.C. § 2243, (emphasis added). *See Withrow v. Williams*, 113 S. Ct. 1745, 1766 (1993) (Scalia, J., concurring in part and dissenting in part).

Given the growing tendency of the Supreme Court to shut the door on second petitions even when issues were defaulted due to errors by counsel, *see Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1720 n.5 (1992), it is understandable that Mr. McCabe wished to bring all his claims in one pending proceeding rather than move to dismiss and

start again when he had fully exhausted his new issues. There is nothing at all in this record to suggest that the motion for a stay was brought to delay, to vex, or to harass, or that the request was an abuse of the writ. *See Sanders v. United States*, 373 U.S. 1, 18 (1963) ("Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, to entertain collateral proceedings whose only purpose is to vex, harass, or delay."). Moreover, were we to close the door on Fetterly at this juncture, he would no doubt file a second petition in the district court based on these same claims. If so, we would see the same claims again, but they would be encumbered with all the new issues that come with subsequent petitions.

C.

Under the circumstances, the appropriate remedy at this juncture is to issue a limited remand to the district court with orders to permit Fetterly to amend his petition to add newly exhausted claims and to proceed accordingly. Because there is no petition before us in which his claims of § 19-2515(c) error and related ineffective counsel are spelled out, we reiterate that we are in no position to render an informed opinion on the merits of these subjects. All we are competent to adjudicate is whether it was error to deny Fetterly's motion for a stay. Moreover, the *Charboneau* issue is shrouded by other legal issues that are best litigated in district court. Is Fetterly precluded from raising his Idaho Code § 19-2515(c) issue by virtue of Idaho Code § 19-2719, which requires that all challenges to a conviction and sentence be raised in a timely petition for post-conviction relief under penalty of

forfeiture of those claims; Was Fetterly defaulted by the Supreme Court of Idaho on procedural grounds? If so, can he demonstrate "cause" and "actual prejudice" or a "fundamental miscarriage of justice" that would relieve him of this procedural default? *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986). Does *Charboneau* represent a "new rule" of constitutional interpretation as claimed by the Supreme Court of Idaho, or does this label misunderstand the "new rule" doctrine? Does *Teague v. Lane*, 489 U.S. 288 (1989) stand in Fetterly's way as claimed by Idaho's Attorney General? Did the Supreme Court of Idaho misapprehend federal law in connection with retroactivity? Was Idaho compelled by the Constitution of the United States to apply the plain meaning of Idaho Code § 19-1515(c) to Fetterly notwithstanding the finality of his case? Were any errors committed by the sentencing court adequately remedied by the opinion of the Supreme Court of Idaho? *See Barclay v. Florida*, 463 U.S. at 956-958. These and any other issues raised by Fetterly's amended petition if germane shall be litigated in the trial court.

REMANDED for further proceedings in accord with this opinion. When such proceedings have been concluded, the parties shall promptly so notify this court by filing with the Clerk of this court a copy of the district court's final decision. This filing shall be accompanied by a copy of any notice of appeal from that decision filed with the Clerk of the district court pursuant to Fed. R. App. P. 3 and 4. Fetterly's remaining issues remain with this court, but submission of them for decision is hereby ordered deferred.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD KENNETH FETTERLY, *Petitioner-Appellant,* v. DAVID PASKETT, WARDEN, IDAHO STATE PRISONS; and JIM JONES, ATTORNEY GENERAL OF THE STATE OF IDAHO, *Respondents-Appellees.*	No. 90-35627 D.C. No. CV-89-1106-MJC ORDER, DISSENT, AND CONCURRENCE

Filed January 24, 1994

Before: Mary M. Schroeder, Edward Leavy, and Stephen S. Trott, Circuit Judges.

Dissent by Judge Kozinski; Concurrence by Judge Trott

ORDER

The panel has voted to deny appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The manner failed to receive a majority of the votes of the nonrecused active

judges in favor of en banc consideration. Fed. R. App. P. 35. Judges Kozinski, Hall, and Wiggins would grant the suggestion for rehearing en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

KOZINSKI, Circuit Judge, with whom Circuit Judges HALL and WIGGINS join, dissenting from the order rejecting the suggestion for rehearing en banc:

The Supreme Court has told us in no uncertain terms that we may not delay federal habeas proceedings so the petitioner can litigate unrelated claims in state court. *In re Blodgett*, 112 S.Ct. 674, 676 (1992). Rather, our duty is "to take all steps necessary to ensure a prompt resolution of the matter. . . . " *Id.*

The district judge here followed this prescription to the letter: He adjudicated expeditiously the claims Fetterly raised in his federal habeas petition and refused to stay proceedings to let Fetterly exhaust an unrelated claim in state court. On appeal, a panel of our court reverses. Without even a nod to *Blodgett*, the panel holds that the district judge abused his discretion by doing what the Supreme Court said he must do. Refusing to look at the claims actually decided by the district court, the panel holds the appeal in limbo so Fetterly can litigate a claim he did not raise *and could not have raised* in his

habeas petition. As Yogi Berra is said to have said, it's deja vu all over again.

The panel's cold shoulder to *Blodgett* is but the first of many errors. The opinion also manages to ignore or misapply *Estelle v. McGuire*, 112 S. Ct. 475 (1991); *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Rose v. Lundy*, 455 U.S. 509 (1982); *Teague v. Lane*, 489 U.S. 288 (1989); and *Godfrey v. Georgia*, 446 U.S. 420 (1980). It's as if the panel figured that, since it was just remanding, it didn't need to get the law right. But such wholesale disregard of Supreme Court precedent has no place among the published opinions of the United States Court of Appeals. And, sure enough, the mischief spawned by this opinion has not been long in coming. Like Frankenstein's monster, its rationale has overtaken even its creator. *Compare Hamilton v. Vasquez*, slip op. 1515 (9th Cir. Feb. 3, 1994) (majority opinion), *with id.* at 1551 (Trott, J., dissenting) (both opinions relying on *Fetterly*).

Moreover, this is a remand order with important substantive consequences: the state's right to prompt adjudication of the habeas petition is permanently impaired and petitioner is allowed to shoehorn into his first habeas petition a claim that wasn't ripe when he litigated his case in the district court. This is not a case, then, where errors committed now can be corrected later; the panel's opinion permanently compromises the law of the case and the law of the circuit. It is highly regrettable, therefore, that the full court has not see fit to take the case en banc.

I

A decade ago, Donald Fetterly was convicted of the first degree murder of Sterling Grammer, an acquaintance of his ex-mother-in-law. After an aggravation and mitigation hearing two months later, an Idaho judge sentenced Fetterly to death. Applying the prevailing interpretation of Idaho's sentencing statute, the judge weighed the mitigating evidence against all the aggravating factors taken together (instead of against each aggravating factor separately). The sentencing judge found that the aggravating factors predominated. Fetterly appealed his death sentence to the Idaho Supreme Court, *State v. Fetterly*, 710 P.2d 1202 (Idaho 1985), and then filed a state request for post-conviction relief, *State v. Fetterly*, 766 P.2d 701 (Idaho 1991) – all without success.

In an unrelated case decided six years after Fetterly's conviction and sentencing, the Idaho Supreme Court held, as a matter of state law, that a sentencing judge must weigh all of the mitigating evidence against each aggravating factor separately. *State v. Charboneau*, 774 P.2d 299 (1989).

Soon thereafter, Fetterly filed a federal habeas petition but failed to allege any error involving *Charboneau;* nor could he, having never raised the issue in state court. Some months later, Fetterly's new attorney became aware of *Charboneau* and filed a second state habeas petition, raising the issue and claiming Fetterly's trial counsel had been ineffective for failing to pursue it earlier. Fetterly also asked the district court to stay his federal habeas proceeding while he went about exhausting state remedies on the *Charboneau* issue. Fetterly no doubt

wanted to keep the case in the district court so he could fold his *Charboneau* claim into his first federal petition, avoiding the cause and prejudice hurdle of *McCleskey v. Zant*, 111 S. Ct. 1454 (1991).

The district court refused to stay the case, *Fetterly v. Paskett*, 744 F. Supp. 966, 976 (D. Idaho 1990), proceeded to adjudicate the claims raised in Fetterly's petition, *Fetterly v. Paskett*, 747 F. Supp. 594 (D. Idaho 1990), and resolved them all against him. While the case was pending on appeal before us, the Idaho Supreme Court rejected Fetterly's *Charboneau*-based state habeas petition, holding that Fetterly's sentence was consistent with Idaho sentencing law at the time his conviction became final and refusing to apply *Charboneau* retroactively, *Fetterly v. State*, 825 P.2d 1073, 1075 (1991) ("[T]he *Charboneau* interpretation of I.C. § 19-2515 does not apply to the present case because the present case was final prior to the issuance of *Charboneau*.").

Our panel does not deal with the substantive issues decided by the district court. Instead, it reverses the order denying Fetterly a stay of federal habeas proceedings while he was exhausting his *Charboneau* claim in state court. The panel remands for the district court to adjudicate Fetterly's newly exhausted claim, all the while keeping Fetterly's stay of execution firmly in place.

A. *McCleskey, Rose, Blodgett* Errors

In *McCleskey v. Zant*, the Supreme Court held that a state prisoner must raise all available claims in his first federal habeas petition. Claims raised in later petitions

must be dismissed as an "abuse of the writ" unless the petitioner can show "cause and prejudice." *McCleskey*, 111 S. Ct. at 1470. Fetterly did raise all of his available claims at the time he brought his federal petition, but later discovered another (his *Charboneau* claim) that he had not raised and could not raise because he hadn't yet exhausted it in state court; Had Fetterly amended his petition to add his *Charboneau* claim, the district court would have had to dismiss the entire petition under *Rose v. Lundy*, 455 U.S. 509 (1982).

Thus, at the time petitioner discovered his *Charboneau* claim (and the related ineffective assistance of counsel claim), he faced three unpalatable choices: He could raise the *Charboneau* claim in federal court, precipitating an immediate dismissal of the entire petition under *Rose*; he could wait and raise it as part of a successive petition, in which case it might be barred by *McCleskey*; and, finally, he could ask for dismissal of the first petition without prejudice so he could go exhaust his *Charboneau* claim, in which case he would lose his federal stay of execution, to which he was entitled only so long as his first petition was being adjudicated. *See, e.g., Campbell v. Blodgett*, 997 F.2d 512, 520 (9th Cir. 1993) (stay of execution dissolved once federal petition dismissed).

Fetterly's only way out of this trilemma was to obtain a stay of the federal proceedings while he exhausted his *Charboneau* claim and the panel obliges. But, since when is a federal habeas petitioner entitled to put federal proceedings on hold while he finishes up his business in state court? A stay of federal habeas proceedings, after all, is also a stay of defendant's death sentence, impairing the state's legitimate interest in carrying out the sentence

promptly. *In re Blodgett*, 112 S. Ct. at 676. This interference is justified only so long as the petitioner is busy litigating his federal claims; we have no authority to stay a death sentence while the petitioner is doing nothing at all in federal court.

The panel's ruling raises a troubling question: May a federal court drag out a stay of execution for no purpose other than to let petitioner pursue a claim that would require immediate dismissal of the petition if it were actually presented? The answer seems obvious to me: If the federal district court was without jurisdiction to consider Fetterly's *Charboneau* claim because it was yet unexhausted, it's an abuse of the writ – and a blatant end run around *McCleskey* and *Rose* – for the same court to maintain a stay of execution solely to support that claim.[1]

But we need not speculate; the Supreme Court has already given us the answer. *In re Blodgett* is materially indistinguishable from our case. The panel there effectively stayed federal proceedings on appeal while the

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[1] The case would be different had the defendant overlooked an available claim and later asked the district court for leave to amend the petition to include that claim. Under our liberal amendment rules, the district court would probably have abused its discretion in refusing leave to amend. Even if petitioner had finished exhausting a previously unexhausted claim which the case was still in district court, he might well have been entitled to amend the petition to include the newly-exhausted claim. But what the defendant here wanted – and what the panel gives him – is a federal stay of his death sentence while he exhausts an unexhausted state claim. *Fetterly v. Paskett*, 997 F.2d 1294, 1301-02 (9th Cir. 1993).

petitioner exhausted various claims in state court. An exasperated Supreme Court said no:

> The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decisions in *Rose v. Lundy* . . . and *McCleskey v. Zant*. . . . Adherence to those decisions, and their prompt enforcement by the district courts and courts of appeals, will obviate in many cases what the Court of Appeals here seems to perceive to be the necessity for accommodating multiple filings.

112 S. Ct. 674, 676 (1992) (citations omitted). The Court focused particularly on the duty of the federal courts to act swiftly when there is a stay of execution in place:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court *the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter,* consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. (emphasis added).

If this case is at all distinguishable from *Blodgett,* it presents an even stronger case for refusing the stay. The *Blodgett* panel held the proceedings in abeyance so the petitioner could file *successive* petitions after exhausting his claims in state court; such petitions would still have been subject to the cause and prejudice requirement of

McCleskey. Here, the panel stays proceedings to help petitioner circumvent *McCleskey*: "[W]ere we to close the door on Fetterly at this juncture, he would no doubt file a second petition in the district court based on these same claims. If so, we would see the same claims again, but they would be encumbered with all the new issues that come with subsequent petitions." *Fetterly v. Paskett*, 997 F.2d 1295, 1302 (9th Cir. 1993). Is it really appropriate to use our stay power as an artifice for avoiding the Supreme Court's rulings?

As the court that drew the Supreme Court's ire in *Blodgett*, we have a special responsibility to tread lightly and avoid the same misstep again. At the very least, we must acknowledge *Blodgett* and try to explain why we think the Supreme Court's admonitions are inapplicable. The panel's silence on this point is more than a little remarkable.

B. *McGuire, Godfrey* Errors

At about the same time as *Blodgett*, the Supreme Court also reversed us for using habeas review to correct state law errors. "Today," the Supreme Court told us, "we reemphasize that it is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 112 S. Ct. at 480. A state's failure to apply its laws properly, the Supreme Court said, did not, in and of itself, violate due process. *Id.* at 482.

Without mentioning *McGuire*, the panel revives the notion that a federal court may second-guess a state supreme court's application of state law. The issue here, it

will be recalled, is whether Fetterly must be resentenced under the Idaho sentencing statute as interpreted by *Charboneau* – a state law case decided long after Fetterly's conviction became final. But when and how state law applies to a particular case is a matter on which the state supreme court has the last word. Here, the Idaho Supreme Court refused to apply *Charboneau* to Fetterly's case, holding that it only applied prospectively, *i.e.*, to defendants whose cases had not become final on direct appeal when *Charboneau* came down. *Fetterly*, 825 P.2d at 1074-75. This surely is a judgment a state supreme court is entitled to make in interpreting and applying state law.

The panel faults the Idaho Supreme Court on two grounds. First, the panel says due process is offended whenever state courts do not give a defendant – even one whose conviction and sentence have become final on direct appeal – the benefit of a new interpretation of state law. 997 F.2d at 1301. Second, the panel says that failing to apply *Charboneau* in Fetterly's case denies him the proportionality review to which he is entitled under *Godfrey v. Georgia*, 446 U.S. 420 (1980). 997 F.2d at 1299. Neither argument holds water.

As to due process, the panel says that "the failure of a state to abide by its own statutory commands may implicate a liberty interest protected by the Fourteenth Amendment against arbitrary deprivation by a state." *Id.* at 1300 This is in direct conflict with *Estelle v. McGuire*, 112 S. Ct. 475 (1991), which held that a state court's determination that a defendant is not covered by a particular state law rule is not cognizable on federal habeas, *id.* at 480, and does not give rise to a due process claim, *id.* at

482. Is there a way to reconcile this apparent conflict? The panel sayeth naught.[2]

The panel also relies on *Hicks v. Oklahoma*, 447 U.S. 343 (1980), where the Court found a due process violation based on a state court's refusal to apply a change in state law to Hicks's case alone. 997 F.2d at 1300. *Hicks* precedes *McGuire* and may have been overruled or narrowed by it. But assuming *Hicks* is still entirely good law, it only prevents a state court from denying an isolated defendant the benefit of a state law that applies to everyone else.

What does this have to do with Fetterly? The Idaho Supreme Court didn't single out Fetterly by arbitrarily refusing him, and him alone, the benefit of the new interpretation. No, what the court said is that *Charboneau* would be applied only to those defendants whose convictions had not yet become final. The distinction between prospective and retrospective application, it noted, is one the U.S. Supreme Court has approved in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and has applied to its own cases, *see, e.g., Trevino v. Texas*, 112 S. Ct. 1547, 1550 (1992) (relying on distinction in *Griffith* between final and pending cases when applying *Batson's* peremptory challenge rule). How, then, can it violate due process for a state

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[2] The panel does say that "Ninth Circuit precedent generally supports this proposition," 997 F.2d at 1300, but the two Ninth Circuit cases it cites – *Ballard v. Estelle*, 937 F.2d 453 (9th Cir. June 1991), and *Hernandez v. Ylst*, 930 F.2d 714 (9th Cir. Apr. 1991) – both precede *McGuire* (Dec. 1991). To the extent they may have once supported the panel's conclusion, they've been overtaken by *McGuire*.

supreme court to limit the retroactive sweep of its decisions precisely the same way?

Equally untenable is the panel's alternate theory that failure to apply the law retroactively violates *Godfrey v. Georgia*, 446 U.S. 420 (1980), because "others similarly sentenced in Idaho have been and will necessarily be treated differently" if they benefit from a new sentencing procedure while petitioner here does not. 997 F.2d at 1299. *Godfrey* and other cases do require that state supreme courts conduct proportionality review which compares the sentence in each death case with those imposed in other, similar cases. But the need to conduct proportionality review surely does not mean – as the panel seems to say – that all changes in the state's capital sentencing law must be applied retroactively to all defendants on death row.

This is clear from *Arave v. Creech*, 113 S. Ct. 1534 (1993), another recent Supreme Court case the panel ignores. Creech was the first defendant sentenced after the Idaho Supreme Court reinterpreted its sentencing law in *State v. Osborn*, 631 P.2d 187 (Idaho 1981). Creech argued that *Osborn* did not narrow the statute enough to ensure meaningful proportionality review, and in support he cited cases decided after his own.[3] The Supreme Court rejected those cases, noting they were irrelevant for purposes of *Godfrey* review: "None of the [subsequently decided] decisions on which the dissent relies, or upon which Creech asks us to invalidate his death sentence,

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[3] He could cite no prior cases because all such cases had been decided under the pre-*Osborn* interpretation of the statute.

influenced either the trial judge who sentenced Creech or the appellate judges who upheld the sentence." *Creech*, 113 S. Ct. at 1544. This fatally undermines the panel's rationale: Since *Godfrey* review may be conducted only by comparison with prior cases, it can be satisfied if Fetterly was sentenced under the same sentencing regime as other pre-*Charboneau* defendants.

He clearly was. The Idaho Supreme Court neatly grouped defendants into two categories: earlier ones who do not get the benefit of *Charboneau* and later ones who do. Fetterly's sentence was compared with others sentenced the same way he was. *See Fetterly*, 825 P.2d at 1074 ("We have not applied the *Charboneau* decision to any case that was final prior to the issuance of *Charboneau* on April 4, 1989."). This case is thus no different from one where the sentencing statute changed; post-*Charboneau* defendants will have their proportionality review conducted vis-a-vis other defendants sentenced in accordance with *Charboneau*, while pre-*Charboneau* defendants like Fetterly have their review conducted vis-a-vis others in their class.

The panel may be making a subtler argument. It may think Fetterly must be sentenced like later defendants to provide a meaningful pool of cases for comparison under *Godfrey*. This is a plausible argument but also foreclosed by *Creech*. Creech was the first defendant to whom the post-*Osborn* statute was applied; there were thus no prior cases with which to compare his sentence. Subsequent cases, the Court told us, were irrelevant. Creech thus was in a class by himself, yet the Court did not seem to think this rendered *Godfrey* review impossible or meaningless.

The only rational conclusion to be drawn from *Creech* is that *Godfrey* proportionality review does not require identical sentencing schemes. State judges can compare sentences imposed on earlier defendants even when the wording or interpretation of the sentencing statute has changed somewhat. The point, after all, is not to freeze the sentencing law in place, but to ensure that death sentences are carried out only in the most egregious cases. Comparisons for this purpose can be based on the facts and circumstances of the various cases, even though the sentences may have been imposed under different statutory standards.[4]

Whether its misunderstanding stems from *McGuire* or *Godfrey*, the panel's holding that any new interpretation of the sentencing law must apply retroactively to all inmates on death row has alarming implications. Not only will every reinterpretation or amendment of the capital sentencing statute give each inmate on death row a right to demand resentencing and start the process of collateral and tertiary review from scratch, but it also will make state supreme courts think twice about their rulings. Much as they may want to give the statute a narrowing interpretation or construe it to operate more fairly, state supreme court justices will have to consider

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[4] If this were not the case, it would be impossible to conduct proportionality review as to the first defendant sentenced after a death sentencing statute is amended. Worse, it could preclude the imposition of *any* death sentence under such a statute: Once the first death sentence is knocked out on this basis, there would no longer be anyone with whom to compare the second death sentence, so it too would have to be vacated, ad infinitum.

that every defendant awaiting execution will have to be resentenced under that new interpretation. *Godfrey* was never meant to produce such a bizarre result.[5]

C. *Teague Errors*

The Supreme Court has told us repeatedly not to apply new constitutional rules on collateral review of state convictions.[6] *See, e.g., Stringer v. Black,* 112 S. Ct.

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[5] Judge Trott's concurrence suggests that the procedure of Idaho Code section 19-2315(c), as interpreted by *Charboneau,* is constitutionally required because it was adopted in response to Supreme Court cases such as *Gregg* and *Godfrey. See generally* Trott concurrence at 2350-2351. But the panel's opinion says the contrary: "There is, of course, nothing in the Constitution of the United States that requires Idaho's legislature to approach balancing as it has done in Idaho Code § 19-2515(c)." 997 F.2d at 1300. This means that Idaho was free to adopt either a death penalty sentencing procedure that balances all mitigating factors against each aggravating factor *or* balances all aggravating and mitigating factors against each other. Since, according to the panel's own ruling, either of these procedures would satisfy *Gregg, Godfrey,* etc., I fail to understand how Fetterly's Eighth Amendment rights were violated because he was sentenced in accordance with one constitutionally acceptable procedure rather than another.

[6] This rule has two exceptions, neither of which applies here. The panel's rule does not "place[ ] 'certain kinds of primary, private conduct beyond the power of the criminal lawmaking authority to proscribe.' " *Teague v. Lane,* 489 U.S. at 307 (quoting *Mackey v. United States,* 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). After all, the panel's opinion doesn't make the murder Fetterly committed legal. Nor is the panel's new rule the sort "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 313. Whether changes in sentencing jurisprudence apply retroactively is not "central to an

1130, 1135 (1992); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989); *Teague v. Lane*, 489 U.S. 288, 299-310 (1989). Notwithstanding the Court's crystal clear pronouncements, the panel rushes headlong to apply a new, incredibly broad rule retroactively to this petitioner without even explaining why it may do so.[7]

What's the panel's new rule? It is that state supreme courts violate due process and the Eighth Amendment when they refuse to apply a new construction of a criminal sentencing statute retroactively to defendants whose decisions have become final.[8] Does the panel articulate the rationale for its opinion? Not in so many words. However, the panel's ruling turns on its disagreement with the Idaho Supreme Court as to whether Fetterly is entitled to benefit from *Charboneau*. Since the state

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accurate determination of innocence or guilt." *Id.* The defendant is still guilty (or innocent, for that matter) regardless of how the sentencing judge weighs the mitigating evidence.

[7] The panel mentions *Teague* only long enough to observe that *Teague* did not mandate the state supreme court's refusal to apply *Charboneau* retroactively. *See* 997 F.2d at 1298 n.1. True but irrelevant. The question is not whether *Teague* required the state court's ruling, but whether *Teague* permits our ruling. On the latter issue, the panel is pretty much mum.

[8] The new federal rule the panel announces is not *Charboneau* itself, of course. *Charboneau* is an interpretation of state law which was not in any way influenced by federal constitutional concerns. The rule of decision in our court is the applicability of *Charboneau* to Fetterly's case. The panel here is saying that Fetterly is entitled to have *Charboneau* applied to his case because failure to do so violates due process and the Eighth Amendment. This is the new federal rule, and a mighty sweeping one at that.

supreme court's refusal to apply *Charboneau* to Fetterly's case was based on a particular rationale – that state habeas petitioners are not entitled to the benefit of a new construction of a sentencing statute – the panel must be saying that this rationale violates due process. 997 F.2d at 1300 (describing Idaho Supreme Court's refusal to apply *Charboneau* retroactively as a "failure of a state to abide by its own statutory commands" which violates due process).

Is this rule new? You bet it is. I am aware of no authority for the proposition that a state supreme court violates due process by choosing to apply a new interpretation of a state (sentencing) statute only to cases not yet final on appeal. Everything the Supreme Court has said on the subject has been to the contrary. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 326-28 (1987); *Trevino v. Texas*, 112 S. Ct. 1547, 1550 (1992).

This portion of the panel's ruling, incidentally, is not limited to death cases. As best I can tell, its holding – that a state violates due process by refusing to apply one of its decisions retroactively to prisoners whose conviction and sentence have become final – is generally applicable in all criminal cases. The effect of this ruling on the prison population in the nine states of this circuit is difficult to predict, but it surely will not be trivial.

The panel also announces a narrower rule applicable to death cases only: that *Godfrey* requires a state to apply any changes in its death sentencing statute to all inmates on death row. This too is new and different; this too requires application of *Teague*.

Moreover, the panel seems to think it may put off the *Teague* issue until remand:

> [T]he *Charboneau* issue is shrouded by other legal issues that are best litigated in district court. . . . Does *Teague v. Lane* stand in Fetterly's way as claimed by Idaho's Attorney General?

997 F.2d at 1302 (citations omitted).

This is one of the panel's most obvious mistakes. The *Teague* inquiry is a threshold question, not the stuff of remands or subsequent determinations. In announcing a new rule, courts must first determine whether – pursuant to *Teague* – the rule will be applied retroactively. So the Supreme Court has thrice told us:

> In our view, the question "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced *at the time of [that] decision." Retroactivity is properly treated as a threshold question*, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue.

Teague, 489 U.S. at 300-01 (plurality opinion) (citations omitted) (emphasis added) (brackets inserted by the Court). Again: "Under *Teague*, we address the retroactivity issue as a threshold matter because Penry is before us on collateral review." *Penry v. Lynaugh*, 492 U.S. 302, 329 (1989). And yet again: "As he is before us on collateral review, we must first determine whether the relief

sought would create a new rule under our holding in *Teague* . . . and *Penry*. . . . If so, we will neither announce nor apply the new rule sought by Parks unless it would fall into one of the two narrow [*Teague*] exceptions." *Saffle v. Parks*, 494 U.S. 484, 487-88 (1990) (citations omitted).[9]

Parks is of particular significance and underscores why the announcement of the substantive rule may not be divorced from the *Teague* analysis: If the rule the habeas petitioner seeks is barred by *Teague*, the federal court may "neither announce nor apply the new rule." 494 U.S. at 487. The panel here both announces a new rule in a published opinion and applies it to petitioner by reversing the district court for legal error. In so doing, the panel overlooks yet another body of Supreme Court case law.

* * *

Any one of the errors discussed here – the panel's flouting of *Blodgett*, its circumvention of *McCleskey*, its disregard of *McGuire*, its misreading of *Godfrey* or its refusal to abide by *Teague* – would, by itself, render this opinion untenable. An opinion that commits all these errors has no place in the case law of this circuit. We have a responsibility to put our own house in order, I dissent.

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[9] The only exception to this rule was announced in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), where the Supreme Court held that it need not raise the *Teague* issue sua sponte when the parties did not raise it. Here, as the panel notes, the State has raised *Teague* vigorously. *See* 997 F.2d 1302.

TROTT, Circuit Judge, Concurring in the Order rejecting the suggestion for rehearing en banc:

Estelle v. McGuire, 112 S. Ct. 475 (1991), which Judge Kozinski believes has been ignored,[1] merely reprises the unremarkable and long-standing proposition that " 'federal habeas corpus relief does not lie for errors of state law.' " *Id.* at 480 (quoting *Lewis v. Jeffers*, 497 U.S. 764 (1990)). *Estelle v. McGuire* is not a landmark decision. It simply reiterates the settled law and then applies it to a pending case.

Hicks v. Oklahoma, 447 U.S. 343 (1980), appears to be better authority for the instant case than *Estelle v. McGuire* because the issue in *Hicks* is more similar to the issues raised by Fetterly. Whereas *Estelle v. McGuire* deals with the admissibility of evidence and limiting jury instructions, *Hicks* demonstrates how a state law *sentencing* error can be a deprivation of a due process interest protected by the Constitution:

> It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the

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[1] Because this opinion attempts to answer Judge Kozinski's dissenting opinion from the rejection of the suggestion for rehearing en banc, the reader would be well advised to read Judge Kozinski's opinion first.

> extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Id. at 346 (citations and footnote omitted). Substitute "life interest" in this quotation for "liberty interest" and it is easy to see that *Hicks* is apposite.

Estelle v. McGuire does not hold, nor has it ever been held, that a deficiency amounting to a state law error can never violate the Constitution, laws, or treaties of the United States. *See* 28 U.S.C. § 2241 (1988). What is clear from *Estelle v. McGuire* is that the demonstration of an error under state law does not ipso facto equate to the demonstration of a denial of due process under the Constitution. But a State may not terminally slam the habeas door in a federal court's face merely by alleging that all it did was break its own axial rules in sentencing someone to death. The incantation by a State of "state law error" certainly should signal caution to a federal court hearing a petitioner's claim under habeas, but it does not put an end to the inquiry – it begins it.

So the question presented when we confront an error of state law is, "yes, but does what happened to the

defendant-petitioner also ascend to the level of a violation of fundamental fairness as protected by the Fourteenth Amendment and, as in this case, as guarded against by the Eighth Amendment?" One can read *Estelle v. McGuire* itself to see how this works. *See also Brown v. Allen*, 344 U.S. 443 (1953); *Moore v. Dempsey*, 261 U.S. 86 (1923).

In the case of Donald Fetterly, no one disputes his claim that the judge who sentenced him to death failed to apply the state statute governing how the crucial decision between life and death shall be made. No one can dispute Fetterly's claim that under Idaho law, the state trial court "did not engage in the balancing procedure mandated by the legislature." *Fetterly v. State*, 825 P.2d 1073, 1081 (Idaho 1991) (Bistline, J., dissenting on denial of petition for rehearing). This structural failure is materially different from a misapplication of an aggravating circumstance to the facts of a case. *Lewis v. Jeffers*, 497 U.S. at 780. So the question for us is whether the sentencing judge's failure to follow an essential element of the controlling state sentencing statute was just a violation of state law, or was it also the kind of breach or defect that violates the Eighth and Fourteenth Amendments?

On the merits of whether Idaho's sentencing failure was more than just a state law error, i.e., whether it also violated the Eighth and the Fourteenth Amendments, the issue is reasonably straightforward. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court told the States that the Constitution would permit them to impose the death penalty for certain offenses, but *only* if they regularly followed procedures that would ensure that "where discretion is afforded a sentencing body on a matter so

grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. Four years later in *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court repeated the requirement that these procedures provide "a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Id.* at 427 (quoting *Gregg*, 428 U.S. at 188) (internal quotations omitted). As Justice Powell said in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "Beginning with *Furman* the Court has attempted to provide *standards for a constitutional death penalty. . . .* " *Id.* at 111 (emphasis added). Justice Scalia summed up the Court's jurisprudence on this issue in *Walton v. Arizona*, 497 U.S. 639 (1990) (Scalia, J., concurring in part and concurring in the judgment):

> Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing – effectively requiring capital sentencing proceedings separate from the adjudication of guilt, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 301-305 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (opinion announcing judgment), dictating the type and extend of discretion the sentencer must and must not have, *see, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Godfrey v. Georgia*, 446 U.S. 420 (2980) [sic], requiring that certain categories of evidence must and must not be admitted, *see, e.g., Skipper v. South Carolina*, 476 U.S. 1 (1986); *Booth v. Maryland*, 482 U.S. 496 (1987), undertaking minute inquiries into the

> wording of jury instructions to ensure that jurors understand their duties under our labyrinthine code of rules, *see, e.g., Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Mills v. Maryland*, 486 U.S. 367 (1988), and prescribing the procedural forms that sentencing decisions must follow, *see, e.g., McKoy v. North Carolina*, 494 U.S. 433 (1990).The case that began the development of this Eighth Amendment jurisprudence was *Furman v. Georgia*, 408 U.S. 238 (1972) (*per curiam*), which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards so that the death penalty is not inflicted in a random and capricious fashion.

Id. at 657 (citations omitted). "No adequate procedures no death penalty" has been the constant message from the Court.

To comply with these instructions, Idaho enacted very specific statutes. One of these statutes, Idaho Code § 19-2515(c), prescribes unequivocally the exact manner in which the pivotal life or death decision shall be made by the sentencing judge. What could be of more importance in the process than the life or death decision itself? This statute was not followed when Fetterly was sentenced to die. Stripped to its essentials, Idaho's argument amounts to a claim that it is currently empowered to impose the death penalty because it has adopted adequate procedures to eliminate arbitrariness, procedures mandated by the Constitution as interpreted by the Supreme Court in *Gregg* and its progeny, but it is also free at the moment of making the life or death decision not to follow those procedures in a given case.

Informed by *Hicks*, I believe Fetterly's claim colorably implicates both a life and a liberty interest specifically protected by both the Eighth and Fourteenth Amendments. What good are crucial *Constitutional* rules established in response to *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg* if the States are free not to follow them *in their essentials* once they are on their books? Just a state law problem? The Supreme Court has advised us that

> under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

Caldwell v. Mississippi, 472 U.S. 320, 329 (1985) (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). In *Caldwell*, the Court overturned a sentence of death because a prosecutor's remarks misled the sentencing jury to believe that the responsibility for determining the appropriateness of the defendant's death lay with an appellate court. In discussing the importance of the life and death decision itself, the Court said:

> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with – *and indeed as indispensable to* – the Eighth Amendment's "need for reliability in the determination

> that death is the appropriate punishment in a specific case."

Id. at 330 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). *Woodson* could not be clearer on this issue:

> [W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 418 U.S. at 304-05 (citations omitted) (emphasis added).

In *Proffit v. Florida*, 428 U.S. 242 (1976), Justice Stewart focused on the Constitutional importance of properly weighing the pertinent circumstances reflecting on the appropriate penalty. Justice Stewart said about that case – which cannot be said about what *occurred* in the instant case – that "[t]he directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding

whether the death penalty is to be imposed." *Id.* at 258. In Fetterly's case the instructions given by the Idaho statute to the sentencing judge were not followed, period.

No matter where one looks, the answer is the same. In *Gardner v. Florida*, 430 U.S. 349 (1977), the Court said it this way:

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens . . . *differs dramatically from any other legitimate state action.* It is of vital importance to the defendant and to the community that *any decision to impose the death sentence* be, and appear to be, based on reason rather than caprice or emotion.
>
> Second, it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *The defendant has a legitimate interest in the character of the procedure* which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

Id. at 357-58 (citations omitted) (emphasis added).

Zant v. Stephens, 462 U.S. 862 (1983), picks up this theme: "Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to

set aside a state-court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." *Id.* at 885.

In *Barclay v. Florida*, 463 U.S. 939 (1983), then Justice Rehnquist made this observation: "One question that has arisen is whether defendants must be resentenced when trial courts erroneously consider improper aggravating factors. If the trial court found that some mitigating circumstances exist, the case will generally be remanded for resentencing." *Id.* at 954-55.

This analysis also finds support in *Mills v. Maryland*, 486 U.S. 367 (1988), a case in which a sentence of death was reversed because the Court found a "barrier" to the sentencer's proper "consideration of all mitigating evidence":

> Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The *possibility* that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

Id. at 383-84 (emphasis added). In Fetterly's case, there is more than a possibility that his sentencer conducted his task improperly vis-a-vis the mitigating evidence: we know this is precisely what happened. In the words of *Zant*, this presents a "colorable claim" of Constitutional error. *See also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

Justice O'Connor's reflection in her concurrence in *Eddings v. Oklahoma*, 455 U.S. at 118, is pertinent: "[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Here, the sentence imposed was unquestionably determined by a sentencing judge who made a crucial organic *mistake* as to the manner in which he was required to use the various circumstances to make his decision.

Gregg is reduced to a hollow promise if a State may ignore the essentials of its own *Gregg*-required rules regarding the manner in which the core decision of who shall live and who shall die is made. What other *core* death penalty decision-making deviations will be tolerated in the name of state law error? If this one, why not all? Do we only care about what is in a state's statutes and not what actually happened to a defendant? Where is the product of the " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not' " in circumstances where the sentencing judge fails to follow the critical statute? Where does the judge get the authority to sentence a person to die if not from a statute? By definition, the life or death decision necessarily becomes arbitrary if the manner in which it is made is not authorized by the controlling law. The relevant definition of "arbitrary" is, "established by a court or judge rather than by a specific law or statute." Webster's II New Riverside University Dictionary (1984). Once a state has chosen a Constitutionally valid approach, it must stick to the script. It

would appear that this kind of a violation is *precisely* what habeus as is designed to address.

Judge Kozinski is concerned that our holding will spill over into other areas. I do not have that fear. This is a death penalty case, and it involves the life or death decision itself. It is a mistake to assume that our holding could be successfully cited for the proposition that *all* state law sentencing errors amount to a denial of due process. *See Zant v. Stephens*, 462 U.S. at 885 ("[N]ot every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state-court judgment. . . . ").

Judge Kozinski also says we must turn away Fetterly's sentencing claim because of *Teague v. Lane*, 489 U.S. 288 (1989), which prohibits the application of a new *Constitutional* rule on collateral review of state convictions. The point Judge Kozinski appears to have missed is that Fetterly asks only that he be sentenced in conformity with the *statute on the books* at the time he was sentenced. He seeks neither the retroactive application of a "new" holding nor the benefit of a "new rule." Judge Kozinski miscasts *Charboneau* as involving a "*new* construction of a state sentencing statute" (emphasis added). Not so. In *Charboneau* the Idaho Supreme Court clearly said that all it was doing was reading the controlling statute word for word as it was written. There was nothing "new" in *Charboneau*, just a recognition of what was already there in the form of direction from the legislature. I repeat here what was quoted in our panel opinion as the basis for the Idaho Supreme Court's decision granting a new sentencing hearing to Charboneau: "If the legislature had intended the mitigating circumstances to be weighed against all the aggravating circumstances found as a

group, it would have referred 'to the aggravating circumstances found.' *The plain meaning of the statute dictates* our conclusion on this issue." 774 P.2d at 323 (emphasis added).

No rule "dictated" by anything is a "new rule." How do we know this? Because the Supreme Court said so in *Butler v. McKeller*, 494 U.S. 407 (1990): "[A] decision announces a new rule ' "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." ' " *Id.* at 412 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989) (quoting *Teague*, 489 U.S. at 301)) (emphasis in original).

Moreover, our panel opinion has neither fashioned nor applied a "new rule." *Furman, Gregg, Godfrey, Woodson, Proffit, Eddings, Gardner,* and *Hicks* all predate Fetterly's conviction, and certainly dictate the result in this case.

Judge Kozinski complains we have given *In re Blodgett*, 112 S. Ct. 674 (1992), the "cold shoulder." But I respectfully believe he misstates *Blodgett* when he claims we have been told by the Court "we may not delay federal habeas proceedings so the petitioner can litigate unrelated claims in state court." What the Court said was as follows:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, *consistent with its duty to give full and fair*

> *consideration to all of the issues presented in the case.*

Id. at 676 (emphasis added).

The procedural complexities in the case of Charles Rodman Campbell and the delays as detailed in *Blodgett* are not comparable to the instant case. Moreover, unlike the instant case, *Blodgett* involved a *second* petition in federal court, not a first filing. The handling of Fetterly's case has been fully consistent with our duty to give full and fair consideration to *all* of the issues presented in the case, and consistent with the sworn responsibility of federal judges to guard against a State's wish to execute a prisoner who may well have been denied his rights as a citizen of the United States to the due process of law guaranteed by the Fourteenth Amendment, and whose sentence of death may have been arbitrary in violation of the Eighth Amendment. Because of the unusual posture in which this issue comes to us – it was not heard on its merits by the district court – we are unable to render a final decision on it, but it does appear that it constitutes a "colorable claim" deserving of a hearing, and that it was error for the district court to have denied Fetterly the stay he requested.